Oral Argument Not Yet Scheduled

Nos. 16-1357, 16-1421

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

E.I. DU PONT DE NEMOURS & CO.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION,

Intervenor.

On Petition for Review and Cross-Application for Enforcement
of an Order of the National Labor Relations Board

BRIEF OF INTERVENOR UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. **Parties and Amici.** All parties, intervenors, and amici appearing before the National Labor Relations Board and in this Court are listed in the Brief for the National Labor Relations Board.

B. **Ruling Under Review.** References to the ruling at issue appear in the Brief for the National Labor Relations Board.

C. **Related Cases.** This case was previously before this Court in *E.I. Du Pont de Nemours & Co. v. NLRB*, Case Nos. 10-1300, 10-1301, 10-1353 & 10-1355. The Court's decision, reported at 682 F.3d 65 (D.C. Cir. 2012), remanded this case to the NLRB. Counsel for intervenor is not aware of any related case currently pending in this Court or any other court.

Respectfully submitted,

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Date: July 28, 2017

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GLOSSARY

"ALJ"	Administrative Law Judge
"JA"	Joint Appendix
"NLRA" or "the Act"	National Labor Relations Act
"NLRB" or "the Board"	National Labor Relations Board
"Pet. Br."	Brief of Petitioner E.I. DuPont De Nemours and Company
"SA"	Supplemental Appendix

BRIEF OF UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION IN SUPPORT OF RESPONDENT

STATEMENT OF THE CASE

This case involves unilateral changes by E.I. DuPont De Nemours and Company ("DuPont") to numerous employee benefits provided to employees represented by Local 5-2002 and Local 4-786 of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("the Steelworkers"). The affected union-represented employees worked at DuPont's Louisville, Kentucky and Edge Moor, Delaware plants. The company unilaterally changed the benefits during a hiatus between collective bargaining agreements at each plant. The relevant factual background and procedural history of the case follows.

A. Factual Background

1. Louisville

During the period at issue, DuPont and the Steelworkers were engaged in bargaining for a successor agreement to a collective bargaining agreement that expired in March 2002. JA 160 ¶ 48. That expired agreement stated, in relevant part, that "[t]he COMPANY will provide basic Hospital and Medical Surgical coverage as set forth in the DuPont BeneFlex Medical Care Plan." JA 503. For purposes of this case, DuPont and the Steelworkers also stipulated that "[t]he

parties further agreed that employees would be covered by the DuPont U.S. Region-wide Beneflex Flexible Benefits Plan," JA 144 ¶ 4, *i.e.*, by all of the component benefit plans that together make up the BeneFlex Plan.

The BeneFlex Plan is not a single benefit, but rather "a self-insured cafeteria style benefits plan, which includes a variety of benefits options in addition to comprehensive health care coverage, such as dental coverage, vision coverage, a vacation 'buy back' program, a flexible healthcare spending account, personal financial planning services, and life insurance." JA 624 ¶ 3. DuPont advertises the BeneFlex Plan to employees as "a flexible program that enables you to create a personalized package of benefits" that "can combine a variety of options – Medical Care, Dental Care, Vision Care, Health Care and Dependent Care Spending Accounts, Accidental Death Insurance, Employee Life Insurance, Dependent Life Insurance, Vacation Buying, Financial Planning and Legal Services Benefits." SA 7.

Among its various component benefit plans, the BeneFlex Plan includes a mix of geographically-defined plan options, some of which are available to all DuPont employees nationwide and some only at specific locations. For example, several of the medical benefits plans available to employees through the BeneFlex Plan are self-insured "national plan options." JA 50. However, at "certain local sites" DuPont also provides an "Alternative Plan Option" – typically, a plan

provided by an outside insurance company, rather than a self-insured DuPont plan. *Ibid.* *See also* SA 12. In its annual BeneFlex Plan pamphlet, DuPont explained that whether the company provides additional benefits plans at a particular location – such as "a choice of two carriers providing the current [o]ptions" or "an entirely new type of benefit plan, such as a Preferred Provider Organization (PPO) or an HMO" – depends on factors including "[w]hat specific needs and concerns have been expressed by employees." JA 291.

The plan document for the BeneFlex Plan states that "[b]enefits under this Plan shall not apply to any employee or the dependent(s) of any employee in a bargaining unit represented by a union for collective bargaining unless and until collective bargaining on the subject has taken place and any requisite obligations thereunder have been fulfilled." JA 744, 749.[1] In fact, the terms of employee participation in the BeneFlex Plan have historically been a subject of negotiation between DuPont and its unions. In 1994, union-represented employees at the Louisville plant agreed for the first time to accept the BeneFlex Medical Care Plan. JA 144 ¶ 4. When DuPont then raised medical care premiums a few months later, the union filed an unfair labor practice charge claiming the unilateral changes were

[1] As the senior company manager "primarily responsible for the DuPont US Region, Health and Welfare Benefit policy and plan design" testified at the hearing, at DuPont's unionized facilities "Beneflex itself must be bargained, that's contained in the plan document." JA 43-44, 62-63.

unlawful. JA 145 ¶ 9 & 208-229 (decision in *E.I. DuPont De Nemours & Co.*, JD-173-95 (Oct. 5, 1995)). The NLRB ALJ found that the parties had bargained for specific employee health care benefit costs and ordered DuPont to maintain the 1994 premium, co-pay, and deductible levels during the 1995 plan year for union-represented employees. JA 226.[2]

During the next round of collective bargaining at Louisville in 1997, the union "proposed that an alternative health care package be included as an additional medical care option for the DuPont bargaining unit employees, in addition to the then existing Beneflex Medical benefit provided under the Beneflex Plan." JA 149 ¶ 18. For its part, DuPont "proposed language intended to confirm the existing benefits received by employees under the Beneflex Plan, and confirming that receipt of those benefits was subject to all terms and conditions of the Beneflex Plan." JA 149 ¶ 19. Ultimately, the parties did not agree to either proposal. JA 149 ¶ 20.

As directly related to this case, in fall 2003, while negotiations between DuPont and the Steelworkers were ongoing, DuPont presented the union with a

[2] A similar dispute over the BeneFlex Plan occurred at DuPont's Yerkes plant near Buffalo, New York in 1997, leading to a settlement that "specifically provided that the contribution rates for premium payments for the BeneFlex Plan made by bargaining unit members represented by the Buffalo Yerkes Union would be held at 1996 levels[.]" JA 626 ¶ 10. As a result, DuPont did not increase BeneFlex Plan premiums for union-represented employees at the Yerkes plant from 1996 through 2002. *Ibid.*

series of changes to employee benefits under the BeneFlex Plan to take effect in 2004. JA 162 ¶ 58. These changes included:

Medical care plan:

• Increased premiums for medical care coverage for all plan options;

• Restriction of definition of "eligible dependent" to require children age 19 or over to be enrolled as full-time students;

• Separation of lifetime maximum reimbursement for infertility treatment from a $25,000 total cap to a divided $15,000 maximum for medical treatment and a $10,000 maximum for prescription drug treatment;

• Creation of stop-loss for the Mental Health/Chemical Dependency benefit separate from the overall medical stop-loss.

Dental care plan:

• Creation of new preferred dental provider feature of plan.

Vision care plan:

• Change to the definition of Qualifying Life Events for purposes of mid-year enrollment in the vision care plan;

Financial planning plan:

• Elimination of one previously-available plan option;

Health Care Spending Account Plan:

• Change to definition of "ineligible expenses" to permit reimbursement for some over-the-counter medications;

Legal Services Plan:

• Creation of a new legal services plan under the BeneFlex Plan.

Savings & Investment Plan:

• Clarification of right to impose trading restrictions.

JA 163-64 ¶ 62 & 415-18.

The Steelworkers requested bargaining over this list of changes to employee benefits, stating in a letter that "any change to the current Beneflex benefits are subject to good faith bargaining before implementation." JA 163 ¶ 59 & 411. DuPont refused, responding that "it would be wholly inappropriate to engage in bargaining over the recently-announced changes to the Plan" and citing the "Modification or Termination of the Plan" clause in the plan document to the effect that the company had the right to "suspend, modify, or terminate said Plan at its discretion at any time." JA 163 ¶ 60 & 412.[3] On January 1, 2004, DuPont

[3] That provision states that "[t]he Company reserves the sole right to change or discontinue this Plan in its discretion provided, however, that any change in price or level of coverage shall be announced at the time of annual enrollment and shall not be changed during a Plan Year unless coverage provided by an independent, third-party provider is significantly curtailed or decreased during the Plan Year. Termination of this Plan or any benefit plan incorporated herein will not be effective until one year following the announcement of such change by the Company." JA 747, 752.

unilaterally implemented its announced changes. JA 163-64 ¶ 62. The following day, the Steelworkers filed an unfair labor practice charge with the Board. JA 25.

As negotiations over a successor agreement at the Louisville plant continued throughout 2004, the situation repeated itself. In fall 2004, DuPont again presented the Steelworkers with a series of changes to the BeneFlex Plan, this time for the 2005 plan year. JA 164 ¶ 63. These changes included:

Medical care plan:

- Increased premiums for medical care coverage for all remaining plan options;
- Elimination of the Catastrophic Medical Option plan and the creation of a new High Deductible PPO plan;
- Separation of "You plus spouse/partner" or "You plus child(ren)" coverage levels to replace prior "You plus one" coverage level, with higher premiums for "You plus spouse/partner";
- Amendment of definition of "eligible dependent" to include same-sex domestic partners;
- Increase in employee co-pays for maintenance prescriptions purchased at a retail pharmacy rather than through mail-order.

Dental care plan:

- Increase in premiums for one of two dental plan options;

• Separation of "You plus spouse/partner" and "You plus child(ren)" coverage levels to replace prior "You plus one" coverage level, with higher premiums for "You plus spouse/partner" coverage for one plan option.

Financial planning plan:

• Increase in premiums for the financial planning benefit.

Savings and investment plan:

• Change in the method in which interest rates for loans are determined.

JA 165 ¶ 66, 427-30. *See generally* SA 1-39.

As in the previous year, the Steelworkers requested bargaining over this list of announced changes, stating in a letter that "[t]he Employer must bargain in good faith to impasse or agreement on any proposed changes." JA 164-65 ¶ 64 & 423. DuPont again refused, again responding that "it would be wholly inappropriate to engage in bargaining over the recently-announced changes to the Plan," relying on the "Modification or Termination of the Plan" clause in the plan document. JA 165 ¶ 65 & JA 425. On January 1, 2005, DuPont unilaterally implemented its announced changes. JA 165 ¶ 66. The Steelworkers amended its unfair labor practice charge to add the new unilateral changes. JA 25.

2. Edge Moor

The collective bargaining agreement at the Edge Moor plant expired on May 31, 2004. JA 640 ¶ 42. That agreement stated, in relevant part, that "employees

shall . . . receive benefits as provided by the Company's Beneflex Benefits Plan, subject to all terms and conditions of said Plan." JA 706-07.

In June 2004, DuPont proposed that the contract be amended to state that the provision of the collective bargaining agreement pertaining to the BeneFlex Plan "shall survive the expiration of this Agreement and shall remain in full force and effect unless and until the Parties mutually agree to change or terminate" the provision. JA 640 ¶ 43. The Steelworkers did not agree to this language and, in response, offered to accept the BeneFlex Plan with the existing contract language. JA 641-42 ¶ 48. DuPont "rejected that counter-proposal and suggested the Union propose alternative benefit coverage." *Ibid.*

In mid-July, the Steelworkers commenced efforts to formulate a proposal for an alternative employee benefits package. JA 642-43 ¶¶ 50-51, 54. After preliminary discussions with the company – including a union-sponsored presentation by Blue Cross/Blue Shield – the Steelworkers made a formal proposal that bargaining unit members receive medical, vision, dental, life and accidental death and dismemberment insurance through a Blue Cross/Blue Shield plan while continuing to receive vacation buyback and financial planning benefits through the BeneFlex Plan. JA 643 ¶ 56 & 814. At a subsequent bargaining session, the Steelworkers modified that proposal to include flexible spending account benefits under the proposed Blue Cross/Blue Shield plan. JA 643-44 ¶ 57 & 838.

While negotiations over DuPont's and the Steelworkers' competing proposals over employee benefits were ongoing, in October 2004, DuPont presented the union with the same series of changes to the BeneFlex Plan described in reference to the January 1, 2005 changes at Louisville. JA 642 ¶ 53. The Steelworkers requested bargaining, explaining in a letter that "[t]he Employer must bargain in good faith to impasse or agreement on any proposed changes." JA 643 ¶ 55. DuPont refused and "informed the Union that it was going to implement the previously announced changes to the BeneFlex Plan," stating that it "felt that it had the right to do so[.]" JA 644 ¶ 58. On January 1, 2005, DuPont unilaterally implemented the announced changes. JA 644 ¶ 59. The Steelworkers filed an unfair labor practice charge. JA 645 ¶ 60.

B. Procedural History

In its original decisions in this case, the NLRB held that DuPont's unilateral changes to employee benefits in 2004 and 2005 at the Louisville plant, and in 2005 at the Edge Moor plant, violated the Act. JA 15-26 (*E.I. DuPont De Nemours, Louisville Works*, 355 NLRB 1084 (2010)); JA 27-41 (*E.I. DuPont de Nemours and Co. (Edge Moor)*, 355 NLRB 1096 (2010)). The NLRB recognized that, "[i]n the *Courier-Journal* cases, a Board majority found that the employer's unilateral changes to employees' health care premiums during a hiatus period between contracts were lawful because the employer had established a past practice of

making such changes both during periods when a contract was in effect and during hiatus periods[,]" JA 15 (citing 342 NLRB 1093 (2004), and 342 NLRB 1148 (2004)), *i.e.*, that the established pattern of changing health care premiums constituted the "dynamic status quo." The Board nevertheless rejected DuPont's claim that its own pattern of unilateral changes to numerous employee benefits constituted the dynamic status quo on the ground that DuPont's "asserted past practice . . . was limited to changes that had been made when a contract . . . was in effect," explaining that DuPont's changes were "plainly distinguishable [from the changes at issue in *Courier-Journal*] on this basis." JA 15-16.

DuPont petitioned for review of the NLRB's decisions. This Court granted the petition, rejecting the Board's effort to distinguish the *Courier-Journal* decisions from this case and remanding to the Board to "either conform to its precedent" in *Courier-Journal* and similar cases or "give a reasoned justification for departing from [this] precedent." JA 854.

On remand, the NLRB clarified that its rule is that "a past practice [must be] sufficiently fixed as to timing and criteria – thereby limiting employer discretion – as to deem further changes to be a permissible continuation of the dynamic status quo." JA 864. The Board held that the *Courier-Journal* cases and two other cases cited by this Court – *Capitol Ford*, 343 NLRB 1058 (2004), and *Beverly Health & Rehabilitation Services* ("*Beverly 2006*"), 346 NLRB 1319 (2006) – were

inconsistent with the Board's fixed timing and criteria rule because they allowed a "purported past practice effectively involv[ing] limitless discretion" to mature into the status quo, and overruled them on that basis. JA 865-66 & n.24. The Board then applied its rule to this case, holding that DuPont's unilateral changes to numerous employee benefits were unlawful because they were "made with no cognizable fixed criteria" and "were limited in substance only to the extent of the requirement that the same changes be made for nonunit employees, which . . . we find to be no meaningful limitation at all." JA 866-67.

DuPont again petitioned for review in this Court. The NLRB cross-petitioned to enforce its Decision and Order.

SUMMARY OF ARGUMENT

This Court remanded this case to the NLRB to "either conform to its precedent" in *Courier-Journal* and similar cases or "give a reasoned justification for departing from [this] precedent." JA 854. On remand, the Board chose the latter course, providing ample justification for its decision to overrule *Courier-Journal* and return to its established rule that only those past practices that are sufficiently fixed as to timing and criteria constitute the post-contract expiration status quo. That interpretation of the unilateral change doctrine is entitled to deference from this Court, and the Board's application of that doctrine to the facts of this case is supported by substantial evidence.

The NLRB's interpretation of the unilateral change doctrine fully accords with the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962), this Court's case law, and the Board's prior decisions concerning unilateral changes to employee benefits. The Supreme Court in *Katz* distinguished between those changes that are "automatic" and those "informed by a large measure of discretion." *Katz*, 369 U.S. at 746. This Court has further elaborated that for a practice to constitute part of the status quo, it must be "fixed as to timing and criteria." *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 412 (D.C. Cir. 1996). And, the Board has routinely applied this rule to cases involving employee benefits, holding that where an employer "'ha[s] a consistent, established past practice of allocating health insurance premiums' between itself and its employees at a fixed ratio," that practice constitutes the status quo. JA 849 (quoting *Post Tribune Co.*, 337 NLRB 1279, 1280 (2002)).

DuPont's challenges to the Board's decision are unpersuasive. DuPont admits that its wide-ranging changes to employee benefits involved the exercise of discretion. The company nevertheless claims that *Katz* requires only that such changes be broadly similar to past adjustments, arguing that the Supreme Court's references to "automatic" changes and changes "informed by a large measure of discretion" were mere "factual observations," rather than integral to the Court's holding. Even a cursory reading of *Katz*, as well as a review of this Court's many

decisions concerning the unilateral change doctrine, demonstrates that DuPont is incorrect. Far from a mere "factual observation," the degree of discretion exercised by an employer is key to determining whether a particular unilateral change constitutes maintenance of the status quo or an unfair labor practice.

As a fallback argument, DuPont claims that the union at Edge Moor failed to engage in the limited-purpose bargaining permitted by *Stone Container Corp.*, 313 NLRB 336 (1993), which allows an employer to insist on separate negotiations over a discrete condition of employment where bargaining over that issue cannot await an impasse in overall negotiations. Even if DuPont could show that bargaining over the wide range of changes to employee benefits at issue here constituted the sort of discrete condition of employment to which *Stone Container* applies, and that bargaining over these changes could not await an overall impasse – which it cannot – the record clearly demonstrates that it was *the company*, not the union who refused to bargain over the announced changes to employee benefits at Edge Moor.

ARGUMENT

In its previous decision, the Court observed that the NLRB's precedents were inconsistent with regards to when, "[u]nder *Katz*, an employer unilaterally may implement changes 'in line with [its] long-standing practice' because such changes amount to 'a mere continuation of the status quo.'" JA 849 (quoting *Katz*,

369 U.S. at 746). In one line of cases, the Board had held that the sorts of discretionary and *ad hoc* changes to employee benefits at issue in this case were unlawful under certain of its precedents. JA 853-54 (citing cases). The Court pointed out, however, that under a *different* line of Board precedents, "even making broad changes to a benefits package can qualify as 'a well-established past practice' that an employer may lawfully continue during a hiatus period" where the employer was required "to 'treat the [union] employees exactly the same as [the non-union] employees.'" JA 850-51 (quoting *Courier-Journal*, 342 NLRB at 1094). The Court thus remanded this case to allow the Board to resolve this inconsistency in its case law.

On remand, the NLRB overruled the inconsistent precedents noted by the Court and held that the sort of highly discretionary changes to employee benefits at issue in this case fall outside the "limits to the scope of the unilateral changes an employer may lawfully make during negotiations." JA 849 (discussing *Katz*). Because the Board has followed the Court's instruction on remand, and has fully explained the basis for its decision, that decision should be enforced.

I. The NLRB fully complied with the terms of this Court's remand and properly concluded that only those practices which are fixed as to timing and criteria constitute the status quo

The inconsistent precedents noted in the Court's earlier decision in this case were principally the NLRB's *Courier-Journal* decisions. Those cases involved "an

increase in the health insurance premium to be paid by employees together with 'a number of more far-reaching changes in the healthcare insurance benefits'" made by the employer during a hiatus between collective bargaining agreements. JA 850 (quoting *Courier-Journal*, 342 NLRB at 1093). The employer in those cases argued that the changes were authorized by a provision in the expired agreement which stated that the employer would provide health insurance "on the same terms as are in effect for employees not represented by a labor organization" and that "[a]ny changes (benefits and premiums) in such plans shall be on the same basis as for non-represented employees." *Courier-Journal*, 342 NLRB at 1093 (quoting CBA).

Although the NLRB observed that this contract language "vest[ed] complete discretion in the Employer,"[4] and the Board noted the breadth of the changes to healthcare premiums and benefits, it nevertheless held that the company's unilateral changes were permissible under *Katz*. *Id.* at 1094-95. The rationale for the Board's decision, as this Court observed, was that "the employer was obligated under its past practice to 'treat the [union] employees exactly the same as [the non-union] employees,' and so the employer's 'discretion was limited' because it 'did

[4] Indeed, the Board stated that the employer's discretion over health insurance matters under the expired contract was so complete that "[i]f impasse is reached, . . . the employer cannot implement its proposal[.]" *Courier-Journal*, 342 NLRB at 1095 & n.7 (citing *McClatchy Newspapers*, 321 NLRB 1986 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997)).

not have the freedom to grant [non-union] employees a benefit and deny same to [union] employees.'" JA 851 (quoting *Courier-Journal*, 342 NLRB at 1094) (bracketed language in *DuPont*).

In its previous decisions in this case, the NLRB recognized that the proposition that "the Act should permit employers which maintain benefit plans . . . to refuse to engage in collective bargaining over their plans at all, so long as they treat unionized and nonunionized parts of the work force identically" had been "rightly rejected" in the Board's prior decisions because it granted far too much discretion to the employer over a mandatory subject at a time when the parties were negotiating for an agreement over that same topic. JA 17 (citing *Larry Geweke Ford*, 344 NLRB 628 (2005)). Nevertheless, while recognizing that "the *Courier-Journal* decisions are in tension with previously settled principles," JA 16 n.5, the NLRB sought to distinguish those cases rather than overrule them, "on the ground that the employer there had 'established a past practice of making [health care premium] changes both during periods when the contract was in effect and during hiatus periods' whereas Du Pont has made uncontested unilateral changes to Beneflex only while CBAs were in effect," JA 852 (quoting *DuPont, Louisville Works*, at JA 16). The Board "emphasized the importance of this 'factual distinction' as follows: 'Extending the *Courier-Journal* decisions to the situation presented here would conflict with settled law that a management-rights clause

does not survive the expiration of the contract . . . and does not constitute a term and condition of employment that the employer must continue following contract expiration.'" *Ibid.* (quoting *DuPont, Louisville Works,* at JA 16) (indentation omitted).

This Court held that the *Courier-Journal* decisions could not be distinguished on that basis, pointing out that the NLRB had stated in the *Courier-Journal* decisions and at least two other recent cases that "the lawfulness of a change in working conditions made after the CBA has expired depends not upon 'whether a contractual waiver of the right to bargain survives the expiration of the contract' but rather upon whether the change 'is grounded in past practice, and the continuance thereof.'" JA 852-53 (quoting *Courier-Journal,* 342 NLRB at 1095, and citing *Capitol Ford,* 343 NLRB 1058 (2004), and *Beverly Health & Rehabilitation Services, Inc.*, 346 NLRB 1319 (2006) ("*Beverly 2006*")). The changes made by DuPont "were therefore lawful under *Courier-Journal*." JA 851 In reaching that conclusion, the Court pointed to the fact that, "here as in *Courier-Journal*, the employer was obligated under its past practice to 'treat the [union] employees exactly the same as [the non-union] employees,' and so the employer's 'discretion was limited' because it 'did not have the freedom to grant [non-union] employees a benefit and deny the same to [union] employees.'" *Ibid.* (quoting *Courier-Journal,* 342 NLRB at 1094) (bracketed language in *DuPont*).

The Court nevertheless recognized that "the Board had in several earlier cases held unilateral changes made pursuant to a past practice developed under an expired management-rights clause were unlawful." JA 853-54 (citing *Beverly Health & Rehab. Servs.*, 335 NLRB 635 (2001) ("*Beverly 2001*"); *Guard Publ'g Co.*, 339 NLRB 353 (2003)). However, because "the Board clearly took a different position in more recent decisions," such as *Courier-Journal*, the Court remanded the case to permit the Board to clarify its precedent. JA 854.

On remand, the NLRB stated that it was returning to the rule that "unilateral, postexpiration discretionary changes are unlawful, notwithstanding an expired management-rights clause or an ostensible past practice of discretionary change developed under that clause." JA 861. The Board recognized, in keeping with this Court's decision, that "the status quo that must be maintained after a contract's expiration includes extracontractual terms and conditions of employment that have become established by past practice[,]" but clarified that only those practices "'which are regular and longstanding, rather than random or intermittent, become terms and conditions of unit employees' employment, which cannot be altered without offering their collective bargaining representative notice and an opportunity to bargain over the proposed change . . . .'" *Ibid.* (quoting *Sunoco, Inc.*, 349 NLRB 240, 244 (2007)).

The NLRB thus overruled the *Courier-Journal* cases, as well as its decisions in *Capitol Ford* and *Beverly 2006*, JA 858 n.1, explaining that "[t]he *Courier-Journal* majority's conclusion that the employer's ability to make 'extensive unilateral changes' was sufficiently limited by the requirement that any changes for unit employees be the same as for unrepresented employees is contrary to the past practice doctrine developed in accord with *Katz*." JA 865. "[T]reating unit and nonunit employees alike when making otherwise broad discretionary changes" is not "a fixed criterion sufficient to establish a past practice status quo." JA 866. To the contrary, "because the employers were free to change and even entirely eliminate benefits to employees who are not represented by a union, there are no fixed criteria limiting that discretion." *Ibid.* As the Board explained, that conclusion is entirely consistent with prior decisions holding that "the employer's history of providing the same health plan for all its employees on a company-wide basis did not exempt it from its bargaining obligation." *Ibid.* (describing *Larry Geweke Ford*, 344 NLRB at 632). *See also* JA 865 n.22 (citing *Mid-Continent Concrete*, 336 NLRB 258, 268 (2001), enfd. 308 F.3d 859 (8th Cir. 2002), in which the Board "reject[ed] the employer's argument that it had no obligation to bargain when it changed insurance plans and benefits because it had a past practice of maintaining uniformity between the benefits of unit and nonunit employees").

The Board contrasted the *Courier-Journal* decisions with cases involving "changes in unit employees' health care costs and benefits . . . based on reasonably certain criteria that limited the employer's discretion." JA 865 & n.22 (compiling cases). For example, the Board, in *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984), affd. 772 F.2d 421 (8th Cir. 1985), held that there was "no violation of Section 8(a)(5) where, in accordance with [a] past practice of automatic change, the employer paid one third of an insurance premium increase itself and required employees to pay the remaining two thirds." JA 865. Similarly, the Board observed that, in *Post-Tribune Co.*, 337 NLRB 1279, 1280, the "employer lawfully unilaterally increased employees' required contributions to health care premiums because it had a consistent, established past practice of allocating health insurance premiums between itself and its employees at a fixed ratio." JA 865 n.22. And, in *A-V Corp.*, 209 NLRB 451, 452 (1974), "where the employer's consistent practice with regard to increased insurance costs . . . had been to allocate a portion of such costs to its employees on a pro rata share basis, the employer's allocation of a later premium increase in the same manner represented a continuation of the past practice rather than a unilateral change." JA 865 n.22 (quotation marks omitted).

Turning to this case, the NLRB explained that DuPont's changes to employee benefits "varied widely from year to year, encompassing both changes to the price and content of benefits as well as the elimination and addition of plan

options within benefit plans, including the elimination of entire categories of benefits." JA 866. Those changes were, if anything, more discretionary and *ad hoc* than the changes at issue in the *Courier-Journal* cases, which at least all concerned health insurance, rather than the wide variety of benefits – from medical care to vacation buyback to financial planning – at issue here. Accordingly, the Board found that, "it defies common sense to assert that employees would reasonably perceive that there was an established past practice as to any element of the Beneflex Plan or understand what to expect on the occasion of annual revisions to it." JA 868.

The NLRB also emphasized that, "[b]y [DuPont]'s own admission, while the timing was fixed, there were no fixed criteria for the annual changes; the sole alleged criterion, that any changes apply to unit and nonunit employees alike, does not determine the nature or amount of Plan changes in any apparent way, and [DuPont] identified none." *Ibid.* On this basis, the Board concluded that DuPont's "same basis as" practice constituted nothing more than a *post hoc* description of how the company previously applied its unbounded discretion, rather than a "fixed criteria limiting that discretion" and how it will be exercised prospectively. JA 866.

The NLRB thus acted well within its discretion to determine that "[DuPont]'s wide-ranging and varied changes, made with no cognizable fixed

criteria, did not establish a status quo under our doctrine that [DuPont] was permitted to continue post-expiration." JA 867.

II. The NLRB's decision fully accords with *Katz*, this Court's precedent, and prior Board decisions concerning changes to employee benefits

The NLRB's decision is entirely consistent with the Supreme Court's decision in *Katz*, this Court's decisions interpreting *Katz*, and the many Board decisions that apply the unilateral change doctrine to employer changes to employee benefits.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," 29 U.S.C. § 158(a)(5), which is defined as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment," 29 U.S.C. § 158(d).

In *Katz*, the Supreme Court held that "[u]nilateral action by an employer without prior discussion with the union . . . amount[s] to a refusal to negotiate about the affected conditions of employment[.]" 369 U.S. at 747. As this Court has explained,

> "A unilateral change not only violates the plain requirement that the parties bargain over 'wages, hours, and other terms and conditions,' but also injures the process of collective bargaining itself. 'Such unilateral action minimizes

> the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.'" *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1162 (D.C. Cir. 1992) (*per curiam*) (Edwards, J., concurring) (quoting *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945)).

For that reason, "[t]he Board has taken the position that it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

Although *Katz* involved negotiations for an initial contract, "[t]he *Katz* doctrine has been extended as well to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed." *Ibid.* In such cases, "[t]o avoid running afoul of the unilateral change doctrine, an employer must maintain the status quo as to terms and conditions of employment after the expiration of a collective bargaining agreement." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 373-74 (D.C. Cir. 2017).

In addition to static terms and conditions of employment defined by the contract, such as seniority or paid holidays, a "regular and consistent past pattern of change" may also constitute the status quo that the employer is required to maintain – the so-called "dynamic status quo." Robert A. Gorman & Matthew W.

Finkin, Basic Text on Labor Law 615 (2d ed. 2004). Thus, for example, where the employer has an established practice of paying annual "longevity-based wage increases" based on a pre-defined wage scale, the employer is required to continue to grant those increases while the parties negotiate a new agreement. *Wilkes-Barre Hosp.*, 857 F.3d at 374-76. *See also Daily News*, 73 F.3d at 416 ("If an established merit-increase program is fixed as to timing and criteria and discretionary only as to amount, then the employer is obligated to keep the program in place and continue to apply the same criteria."). In such a case, the continued granting of longevity-based wage increases in accordance with the employer's wage scale "is not a 'change' in working conditions at all," but rather "the dynamic status quo." Gorman & Finkin, Basic Text on Labor Law, at 615.

In determining whether a particular employer practice constitutes the dynamic status quo, the relevant inquiry is whether the practice is "not completely discretionary," but rather "fixed as to timing and criteria." *Daily News*, 73 F.3d at 412. *Accord Arc Bridges, Inc. v. NLRB*, 662 F.3d 1235, 1239 (D.C. Cir. 2011); *Vico Prods. Co. v. NLRB*, 333 F.3d 198, 209 (D.C. Cir. 2003). *Katz* made clear that there is a difference of substance between wage increases "which are in fact simply automatic increases to which the employer has already committed himself" and "raises . . . [that] were in no sense automatic, but were informed by a large

measure of discretion." 369 U.S. at 746.[5] If the employer exercises unlimited discretion over changes to a mandatory subject of bargaining, "[t]here simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice," and this "of necessity obstruct[s] bargaining," *id.* at 746-47, when the parties are attempting to reach a negotiated agreement over the same subject.

This Court's decision in *Arc Bridges* provides a useful illustration of the difference between changes that are "fixed as to timing and criteria" and those that are "completely discretionary." *Daily News*, 73 F.3d at 412. In *Arc Bridges*, the union charged the company with an unlawful unilateral change when, during negotiations for a collective bargaining agreement, the company denied union-represented employees a wage increase based on the company's annual review of its finances, even though it provided an increase to unrepresented employees. *Arc Bridges*, 662 F.3d at 1237-38. The Board concluded that Arc Bridges' "practice of reviewing its finances each June and then granting nonmerit-based, across-the-board wage increases to employees each July, if sufficient funds existed,"

[5] This Court has recognized that some changes "contain[] both automatic and discretionary elements" and that, in such a case, the employer must maintain the automatic element and "bargain over th[e] discretionary element." *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1189 (D.C. Cir. 1981). Because the scope and substance of the changes to employee benefits at issue here were wholly discretionary, this aspect of the unilateral change doctrine does not apply to this case.

constituted "an established condition of employment for *all* of the [company]'s employees, including those represented by the Union." *Arc Bridges, Inc.*, 355 NLRB 1222, 1223, 1225 (2010) (emphasis in original). This Court disagreed with the Board's analysis, explaining,

> "Arc Bridges points out an obvious problem with the Board's formulation. So far as we can tell, Arc Bridges did not use any particular criteria to determine when to give an increase, or the amount of the increase when it did give one. Even under the Board's formulation, there were no objective criteria for determining whether there would be any wage increase at all. The Board wrote that Arc Bridges gave wage increases when 'sufficient' funds were available or when it was 'feasible' to do so. But this seems highly discretionary, depending on management's budget forecasting, its assessment of the economic climate, its plans for the upcoming fiscal year, and so forth. The situation is thus unlike *Daily News*[], 73 F.3d [at] 411-13 [], in which the amount of an annual raise was discretionary but the merit-based criteria for determining if there would be any raise were fixed. The only common theme linking Arc Bridges' wage increases is timing – a characteristic found insufficient to create a term or condition of employment in *Daily News*. *See id.* at 412 n.3." *Arc Bridges*, 662 F.3d at 1238-39 (citation to NLRB decision omitted).

Although *Daily News* and *Arc Bridges* involved unilateral changes to wages, the same principle applies when employee benefits are changed. As this Court noted, "in *Post Tribune Co.*, the Board held that it was not unlawful for an employer unilaterally to increase employees' required contributions to health care premiums because the employer 'had a consistent, established past practice of allocating health insurance premiums' between itself and its employees at a fixed ratio." JA 849 (quoting *Post Tribune*, 337 NLRB at 1280). Likewise, in *Caterpillar, Inc.*, 355 NLRB 521, 522 (2010), enfd. 2011 U.S. App. LEXIS 11163 (D.C. Cir., May 31, 2011), the Board held that an employer's unilateral changes to a prescription drug plan during negotiations were unlawful because, with regard to prior changes, "[o]ther than the fact that they each altered the [company]'s prescription-drug plan, there is no thread of similarity running through and linking the several types of change at issue here." For that reason, this Court explained, "[t]he facts before the Board were easily distinguishable from precedent in which an employer's past practice occurred with such regularity and frequency that it became the status quo." *Caterpillar, Inc. v. NLRB*, 2011 U.S. App. LEXIS 1163, at *4 (citing *Post-Tribune*, 337 NLRB at 1280; *Daily News of L.A.*, 315 NLRB 1236, 1236-37 (1994); *A-V Corp.*, 209 NLRB at 452).

The unilateral change rule often intersects with another established Board doctrine – the rule that "[a]s a general matter, with respect to mandatory subjects of

bargaining, a party has the right to insist on negotiating an entire contract rather than engaging in piecemeal negotiation over particular issues." *E.I. du Pont de Nemours & Co. v. NLRB*, 489 F.3d 1310, 1317 (D.C. Cir. 2007). *See also Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) ("[A]n employer's obligation to refrain from unilateral changes . . . encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole."). One exception to this rule is that where "a discrete event, such as an annually scheduled wage review" "simply happens to occur while contract negotiations are in progress" and "bargaining over the amount of such increases could not await an impasse in overall negotiations," the employer may insist on separate treatment of the issue as long as it "ma[kes] its proposal in time for bargaining over the matter[.]" *Stone Container Corp.*, 313 NLRB at 336.

The *Stone Container* exception to the overall impasse rule serves the important, though limited, purpose of "provid[ing] a bargaining bridge to cross the transitional period" when "piecemeal treatment is unavoidable, at least on an interim basis." *TXU Elec. Co.*, 343 NLRB 1404, 1407 (2004). Where the *Stone Container* exception applies, "[t]he bargaining subject . . . is not removed from the table[.]" *Ibid.* Rather, although "[t]he general outline of an established annual [] program remains in place, the employer remains obligated to continue to bargain

about [the subject] in negotiations for an overall contract, and the parties may include this subject with others when striking deals for a final agreement." *Ibid.*

Where, for example, an employer has a regular and consistent practice of adjusting wages or benefits that is sufficiently "fixed as to timing and criteria" as to constitute the status quo, *Daily News*, 73 F.3d at 412, the annually-recurring nature of such changes may privilege the employer to insist on separate negotiations over interim adjustments even though overall bargaining is underway. *See, e.g.*, *TXU Elec.*, 343 NLRB at 1407 ("The date for annual review and possible wage adjustment was approaching. Absent a contract on that date, the [employer] had to do *something* with respect to that matter. It could not wait for an overall impasse." (Emphasis in original)). As long as the employer gives the union "timely notice and a meaningful opportunity to bargain over the change in employment conditions," and does not "present[] the . . . changes to the Union as a fait accompli," the employer "[i]s not obligated to refrain from implementing its proposed changes until an impasse [i]s reached on collective-bargaining negotiations as a whole." *Brannan Sand & Gravel Co.*, 314 NLRB 282, 282 (1994).

III. DuPont's challenges to the NLRB's decision lack support in the law and in the record of this case

DuPont admits that the wide-ranging changes it made to employee benefits were "not 'automatic' and involv[ed] some discretion." Pet. Br. 36. The company

claims, however, that its wholesale refusal to bargain with the Steelworkers was justified because the changes it made to employee benefits were "'in line with' past practice and constitute a continuation of the *status quo* under *Katz*"– *i.e.*, that the company's "decade-long pattern of making unilateral changes" itself constituted a practice the company was privileged to continue post-contract expiration. Pet. Br. 36-38. In tension with this principal argument, DuPont appears to acknowledge that, at a minimum, the company was required to engage in *Stone Container* bargaining with the Steelworkers over the changes. *See* Pet. Br. 49-52. Yet, DuPont remarkably contends that it was *the union* (at least at Edge Moor) that refused to engage in *Stone Container* bargaining over the changes, not the company. Pet. Br. 49. Neither claim has merit.[6]

A. DuPont's interpretation of *Katz* conflicts both with the plain language of the Supreme Court's decision as well as this Court's established view of the unilateral change doctrine

DuPont grounds its principal argument in the claim that "the legal standard the *Katz* Court actually applied[] [was] whether the changes were 'in line with the Company's long-standing practice" and that statements in *Katz* that "the specific changes . . . were not 'automatic' and involved 'discretion'" were merely "factual observation[s]" not relevant to the Supreme Court's legal analysis. Pet. Br. 24

[6] DuPont's arguments with regard to the contract coverage doctrine, ERISA, and retroactivity are without merit for the reasons stated by the Board in its brief. *See* NLRB Br. 36-37, 36 n.16 & 47-50.

(quoting *Katz*, 369 U.S. at 746) (underlining by Petitioner). On this basis, DuPont argues that "[t]he BeneFlex changes at issue, while not 'automatic' and involving some discretion, constitute a 'continuation of the *status quo*' under *Katz*" because "DuPont implemented BeneFlex changes every year for a decade" and "[d]uring that period, DuPont consistently adjusted premiums, co-pays and various features of BeneFlex offerings." Pet. Br. 36-37.

As is clear from the discussion in the previous section, DuPont's interpretation of *Katz* is contrary to this Court's longstanding understanding of that decision. This Court has characterized the interplay of "fixed" and "discretionary" aspects of a past practice as "[t]he crucial question" under *Katz*, *Daily News*, 73 F.3d at 412, not a mere "factual observation." *See also Blevins Popcorn*, 659 F.2d at 1189 (describing how *Katz* applies to "both automatic and discretionary elements"); *McClatchy Newspapers*, 964 F.2d at 1162-63 (*per curiam*) (Edwards, J., concurring) (same). The Board's "focus . . . on the *degree* of discretion that the employer purports to exercise" with regard to "what constitutes a past practice that permits an employer's unilateral action in the absence of a bargaining agreement," JA 862 (emphasis added), is thus wholly in keeping with this Court's view of *Katz*.

DuPont's specific claim that, because it "maintained a consistent decade-long pattern of making unilateral changes to BeneFlex affecting employees across the country," and "[d]uring that period, . . . consistently adjusted premiums, co-

pays and various features of BeneFlex offerings," Pet. Br. 36-37, it may continue to exercise that unilateral discretion post-contract expiration, is similarly unavailing. First, this Court has made clear that "fixed timing alone" is not "sufficient to bring [a] program under *Katz*." *Daily News*, 73 F.3d at 412 n.3. *See also Arc Bridges*, 662 F.3d at 1239 (same). Beyond its reliance on "fixed timing," the "obvious problem" with DuPont's argument is that the company "did not use any particular criteria to determine . . . the amount" of its adjustments to employee benefits. *Arc Bridges*, 662 F.3d at 1238-39. It is not enough that the company "maintained a consistent decade-long pattern of making unilateral changes." Pet. Br. 36. A practice of making unilateral changes "informed by a large measure of discretion" – whether a decade old or not – does not constitute an established past practice. *Katz*, 369 U.S. at 746. *See Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999) ("[U]nlimited discretion is not a 'practice' which has evolved into a term or condition of employment."), enfd. 1 Fed. Appx. 8 (2d Cir. 2001).

DuPont's claim that it applied the same changes to union-represented and unrepresented employees is likewise insufficient to establish a past practice. In the first place, DuPont did *not* treat union-represented and unrepresented employees the same with regard to employee benefits under the BeneFlex Plan. *See, e.g.*, JA 145 ¶ 9 (DuPont held premiums constant for union-represented Louisville employees while increasing premiums for unrepresented employees); JA 626 ¶ 10

(same with regard to union-represented employees at DuPont's Yerkes plant). *See also* JA 149 ¶ 18 (describing bargaining over an "alternative health care package . . . as an additional medical care option for the DuPont bargaining unit employees" at Louisville); JA 643-44 ¶¶ 56, 57 (bargaining, at DuPont's suggestion, for an alternative medical plan for union-represented employees at Edge Moor)

Unlike the *Courier-Journal* cases, there is nothing in the collective bargaining agreements here requiring DuPont to treat union-represented employees the same as unrepresented employees for purposes of the BeneFlex Plan. *See* JA 503 (Louisville CBA); JA 706-07 (Edge Moor CBA). Nor is there any such requirement in the BeneFlex plan document. To the contrary, the plan document makes clear that "[b]enefits under this Plan shall not apply to any employee or the dependent(s) of any employee in a bargaining unit represented by a union for collective bargaining unless and until collective bargaining on the subject has taken place and any requisite obligations thereunder have been fulfilled." JA 744, 749. *See also* JA 62-63 (testimony of senior DuPont benefits manager that "Beneflex itself must be bargained, that's contained in the plan document.").

Moreover, because DuPont "w[as] free to change and even entirely eliminate benefits to employees who are not represented by a union, there are no fixed criteria for limiting that discretion." JA 866. This would be a different case if DuPont "claim[ed] that it had an established past practice of making *regular*

annual changes in premium amounts or other aspects of the health coverage" "for *all* its employees, including unit employees." *Larry Geweke Ford*, 344 NLRB at 628 n.1 (Schaumber, Member, concurring) (emphasis added). What matters for determining the dynamic status quo is whether there are "objective criteria" for determining future changes, *not* merely that the employer has previously made "highly discretionary" "across-the-board" changes for union-represented and unrepresented employees alike. *Arc Bridges*, 662 F.3d at 1238. In this case, as was true in *Larry Geweke Ford*, the changes here "were wholly discretionary, variable (including changes in carriers, deductibles, benefit levels and premiums), and made on an ad hoc basis," and, for that reason, "did not constitute an established past practice that became part of the status quo." 344 NLRB at 628 n.1 (Schaumber, Member, concurring).

Indeed, what DuPont calls the "adjust[ment] . . . [of] various features of BeneFlex offerings," Pet. Br. 36-37, actually consisted of significant changes to "about a dozen underlying benefit plans," JA 45, including the elimination of entire plan options, *see, e.g.*, JA 165 ¶ 66 (elimination of the Catastrophic Medical Option under the medical plan), and the creation of entirely new categories of benefits, *see, e.g.*, JA 163-64 ¶ 62 (addition of a Legal Services Plan). Such unilateral changes are far too discretionary and *ad hoc* to constitute an established practice that DuPont was entitled to continue post-contract expiration.

B. DuPont's claim that the union at the Edge Moor plant failed to bargain lacks any support in the record

Displaying little confidence in its primary argument, DuPont appears to acknowledge that, at a minimum, it was required to engage in *Stone Container* bargaining with the Steelworkers[7] – a necessary logical precursor for its claim that at Edge Moor the union "failed to seek bargaining over the recurring changes despite having ample opportunity to do so." Pet. Br. 49. *See generally id.* at 49-52 (discussing applicability of *Stone Container* to this case). The claim that the union at Edge Moor failed to seek bargaining is belied by DuPont's stipulations in this case. And, by limiting its argument to the Edge Moor facility, DuPont implicitly acknowledges that it failed to engage in *Stone Container* bargaining with the Steelworkers at the Louisville plant, where it made identical unilateral changes to employee benefits for bargaining unit members in 2005.

The NLRB's determination that *Stone Container* bargaining was not required at the Edge Moor facility, *see* JA 866 n.26 (reaffirming Board's prior decision on this issue in *DuPont (Edge Moor)*, at JA 37-39), finds ample support in

[7] Indeed, even the dissenting Board member recognized that "the record might support the existence of a refusal-to-bargain violation by DuPont," on the basis that "[t]h[e] duty to engage in bargaining upon request over mandatory subjects, which includes matters that may be unilaterally implemented by an employer under *Katz*, is completed unaffected by any past practice, and an employer's refusal to engage in such bargaining clearly constitutes a violation of Section 8(a)(5)." JA 884-85 (Miscimarra, Member, dissenting).

the record.[8] As an initial matter, as the Board correctly found, "[a]cceptance of [DuPont]'s argument that changes to a wide range of benefits, and even the addition of wholly new benefit plans, should all be considered part of one discrete, recurring, event . . . would transform the *Stone Container* standard into what the Board indicated it should not be – i.e., an exception of 'broad application' and 'disruptive potential.'" JA 38 (quoting *TXU Elec.*, 343 NLRB at 1405).

Moreover, at the time DuPont announced the unilateral changes to employee benefits at the plant, both the company and the Steelworkers had already exchanged proposals concerning changes to employee benefits as part of the overall bargaining for a new agreement. JA 38-39. *See also* JA 640 ¶ 43, 641-42 ¶ 48, 643-44 ¶¶ 56-57. If DuPont had made a showing that "bargaining over [any specific employee benefit contained in the BeneFlex Plan] could not await an impasse in overall negotiations," *Stone Container*, 313 NLRB at 336 – *e.g.*, by showing that "coverage provided by an independent, third-party provider [wa]s

[8] On remand, the Board provided an additional basis for its decision beyond those it articulated previously: that "the *Stone Container* exception is inapplicable in this case because it applies only where the parties are negotiating for an initial collective-bargaining agreement and not to negotiations for successor contracts." JA 866 n.26. Because DuPont did not contest that conclusion in a motion for reconsideration to the Board or in its opening brief to this Court, any argument on the point is waived. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (NLRA § 10(e) bars consideration of arguments not raised to the Board); *Fashion Valley Mall, LLC v. NLRB*, 524 F.3d 1378, 1380-81 (D.C. Cir. 2008) (argument not raised in opening brief is waived).

significantly curtailed or decreased," JA 752 – perhaps it could have insisted on separate bargaining as a "bridge to cross the transitional period" while the parties continued "negotiations for an overall contract," *TXU Electric*, 343 NLRB at 1407. But DuPont never attempted to justify the "piecemeal treatment" of the BeneFlex Plan changes as "unavoidable," as was required if the company desired to engage in separate bargaining. *Ibid.*

Instead, in response to the Steelworkers' request for bargaining on the announced changes to the BeneFlex Plan, DuPont simply told the union "that it was going to implement the previously announced changes" without bargaining because, in the company's view, "it had the right to do so," JA 644 ¶ 58. Despite the Steelworkers' protest that "it did not agree to the implementation, that benefits were a mandatory subject of bargaining, and that it believed that the [company]'s planned action was not legal," "[o]n January 1, 2005, [DuPont] implemented changes to the BeneFlex Plans." JA 644 ¶¶ 58-59. Because it "presented the . . . plan changes to the Union as a fait accompli" rather than "satisfy its obligation to provide the Union with timely notice and a meaningful opportunity to bargain over the change[s] in employment conditions," *Brannan Sand and Gravel*, 314 NLRB at 282, the NLRB was correct to "conclude that [DuPont] failed to meet even the lower bargaining duty that pertains in cases controlled by *Stone Container*." JA 39.

CONCLUSION

The Decision and Order of the National Labor Relations Board should be enforced.

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CERTIFICATE OF SERVICE

I, Matthew J. Ginsburg, certify that on July 28, 2017, the foregoing Brief of Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union was served on all parties or their counsel of record through the CM/ECF system.

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